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January 26, 1996

BY MESSENGER

Kathleen O'Brien Ham, Esq.
Chief, Auctions Division
Wireless Telecommunications Bureau
Federal Communications Commission
2025 M Street, N.W., Room 5202
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Re: Request for Waiver Concerning Audited
Financial Statements in Block C Auction
PP Docket 93-253

Dear Ms. Ham:

This firm represents investors in a number of bidders for personal communications services ("PCS") licenses that now are participating in the Block C auction. We request that the staff issue a decision waiving for all Block C bidders the requirement that a determination of the gross revenues and total assets of affiliates of a bidder (or affiliates of investors in a bidder) for purposes of long-form applications be based upon "audited financial statements" in those limited circumstances where existing audited financial statements are not now available.^{1/} Because of the extreme hardship that the "audited financial statement" requirement would impose upon in entrepreneurial small businesses that have invested in Block C bidders, we request that all bidders in the Block C auction be permitted to rely upon financial statements certified by a responsible corporate officer to be accurate for affiliated companies that do not now have audited financial statements available to them.

The waiver requested here concerns an issue of general applicability that should apply to all bidders, and we urge that the staff address this issue expeditiously. A large

^{1/} Based on the advice of the FCC's staff, our clients and bidders in which they have invested have relied on unaudited financial statements certified to be correct in filing FCC Form 175 applications to participate in the Block C auction.

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number of bidders have made identical waiver requests in connection with their applications to participate in the Block C auction, and still others are likely to file specific waiver requests prior to filing long-form applications.^{2/} Guidance at this point in time for all bidders is crucial because applicants will have a very brief time period -- 10 days from the close of the auction -- to complete and file long-form applications. Given the greater-than-anticipated speed at which the auction is progressing, we urge the staff to address this issue as quickly as is possible.

I.

We agree that it generally is useful and appropriate to rely upon audited financial statements to ensure that accurate assessments of gross revenues and total assets are provided to the Commission.^{3/} In auctions where bidders will be larger or publicly held, bidders will have audited financial statements available; in these cases, the Commission's rule will impose only minimal regulatory burdens upon bidders. In this auction, in contrast, bidders are small businesses and entrepreneurs. Small and entrepreneurial businesses that are not publicly held and that do not have financing from commercial lenders generally do not routinely

^{2/} See, e.g., FCC Form 175 Applications filed by Cyberstar, G.P.; Wireless PCS, Inc.; Americall International, LLC; B&P PCS, Inc.; R&S PCS, Inc.; USA Micro-Cellular, Inc.; Personal Communications Service, Inc.; Wireless Telecommunications Company, Inc.; Western Minnesota PCS Limited Partnership; Whidbey Telephone Company; Overland Company, Inc.; Horsetooth Communications, Inc. See also Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Sixth Report & Order, FCC 95-301 at 32 n.181 (PP Docket 93-253, July 18, 1995) (inviting waiver requests).

^{3/} The FCC's rules require gross revenues and total assets to be determined on the basis of "audited financial statements." 47 C.F.R. §§ 24.720(f), 24.720(g) (1994). In these circumstances where an entity "was not in existence for all or part of the relevant period" and "there is no identifiable predecessor-in-interest," however, it is permissible to rely upon "unaudited financial statements certified by the applicant as accurate." 47 C.F.R. § 24.720(f) (1994).

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prepare audited financial statements, and requiring that hundreds -- perhaps thousands -- of accounting audits be performed solely to satisfy FCC regulations would impose a substantial burden upon these smaller companies.

The burden of obtaining audited financial statements falls particularly heavily upon persons who wish to invest in PCS bidders but who also have interests in other small businesses that would be considered "affiliates" of the bidder under the FCC's rules. The number of separate entities that can be considered "affiliates" of an investor under the FCC's definition of that term can be very large. Some of these entities may have no significant assets or revenues, and others may be in active operation but not generate the level of activity that normally justifies the cost of an audit.^{4/} The cost of performing an audit upon each of these separate entities may be staggering -- one of our clients estimates the cost at approximately \$700,000 in order to cover all of the many entities with which it may be considered to be affiliated under the rules.

II.

In determining whether to require audited financial statements in a particular auction, the Commission should weigh the regulatory burden of obtaining audited financial statements against the incremental benefits these statements can provide to the Commission over and above the reliability of statements certified by an officer to be accurate. For purposes of this auction, the balance should be struck in favor of permitting applicants to rely upon statements that are certified by the investor or affiliate as accurate.

First, statements that are certified as accurate will carry sufficient assurances of reliability because of the use to which these statements will be put.^{5/} Applicants and

^{4/} Moreover, the broad definition of "affiliate" may include companies as to which particular investors may not be legally capable of effecting an audit.

^{5/} It should be noted that the Commission's rules recognize that in some circumstances "unaudited financial statements certified by the applicant as accurate" have sufficient indicia of reliability to be utilized rather than audited financial statements. 47 C.F.R. § 24.720(f) (1994).

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attributable investors that must rely on these statements to prove their basic eligibility will be highly motivated to ensure, through appropriate contractual provisions and penalties, that all parties provide accurate and complete statements. Applicants that incorrectly certify their assets and revenues will risk losing eligibility to participate in the auction or may lose eligibility for important additional benefits. Investors and affiliates that incorrectly certify their assets and revenues and thus endanger a bidder will risk litigation and other private sanctions. These institutional demands will have the effect of ensuring complete and full disclosure of assets and revenues.

Second, the subject waiver would not apply in the vast majority of cases where the requirement actually serves its intended purpose of monitoring compliance with the FCC's rules. Companies with assets or revenues that are significant, relative to the FCC's bidding requirements, are likely already to have audited financial statements by virtue of public status, venture capital investment, or lender requirements. If they have these statements, bidders would be required to utilize these statements in ascertaining total assets and gross revenues. The waiver we seek would give relief only to companies that have not reached this status, and those companies, by and large, are the least likely to have assets or revenues that are of real importance or concern.

Third, and most importantly, the regulatory burden imposed by unbending adherence to this rule would be staggering. For example, as stated above, one of our clients has obtained audited financial statements for perhaps 75 percent of the companies with which it would be considered to be affiliated, but estimates that obtaining audited financial statements for only the remaining companies would require more than six months of accounting efforts and as much as \$700,000 in expense. There is no reason to believe that this burden is atypical. The fact that a substantial number of applicants made parallel waiver requests in their FCC Form 175 applications indicates that the burden of obtaining audited financial statements would be extreme and uniform across the industry.

This clearly is a matter where the grant of a waiver will serve the public interest and prevent the application of a rule in a manner that is "inequitable" and "unduly burdensome." 24 C.F.R. § 24.819(a) (1994). The rule as it

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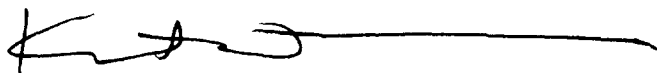
stands to be applied here does inequitably burdens smaller companies and is unduly burdensome. The underlying purpose of the rule will continue to be served by the grant of the subject waiver because the information to be provided to the Commission pursuant to the rule will be continue to be reliable. As described earlier, requiring responsible corporate officers to certify that financial statements are accurate, when combined with the powerful incentives provided by contractual and other mechanisms to ensure accuracy, will provide adequate indicia of reliability.

* * *

For these reasons, we request that the staff issue a general waiver of Sections 24.720(f) and 24.720(g) of its rules to permit investors and applicants that do not now have audited financial statements available to them to rely upon unaudited financial statements certified as accurate for purposes of the Block C auction. It would be appropriate, efficient and equitable for the staff to issue a general waiver of the requirement for all bidders.^{6/} Again, we urge the staff to resolve this matter as quickly as possible.

Please direct any inquiries concerning this matter to the undersigned.

Very truly yours,



Jonathan D. Blake
Kurt A. Wimmer

^{6/} The staff earlier followed this procedure in waiving certain filing requirements for all bidders in both the Block C and Block A/B auctions and in clarifying certain rules prior to the Block C auction. See, e.g., Waiver of Certain Provisions of Section 24.813 of the Commission's Rules, Order, DA 95-507 (PP Docket No. 93-253, March 22, 1995); Waiver of Section 24.813 of the Commission's Rules, DA 95-1130 (PP Docket 93-253, May 19, 1995); Waiver of Section 24.813 of the Commission's Rules, Order, DA No. 94-1198 (PP Docket No. 93-253, Oct. 25, 1994); Wireless Telecommunications Bureau Staff Responds to Questions About the Broadband PCS C Block Auction, Public Notice 54270 (June 8, 1995).

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Docket File